SUPREME FINANCE (M) BHD

v.

WING HONG HOW

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-02-195-95]
4 MAY 1999

CIVIL PROCEDURE: *Service - Writ of summons - Personal service - Exceptions - Rules of the High Court 1980, O. 10 r. 1, O. 62*

CIVIL PROCEDURE: *Summary judgment - Setting aside - Solicitors not authorised to enter appearance for defendant - Rules of the High Court 1980, O. 14*

The appellant sued the respondent and two other persons as guarantors of a loan granted to the first defendant. The writ was served on the **solicitors** for the respondent ('the solicitors') in 1990 by hand. The solicitors replied that they did not have instructions to accept service.

Some three years later, another firm of solicitors ('the second solicitors') purported to enter appearance for the respondent and the other defendants to the action. Summary judgment was subsequently entered against all the defendants. The respondent then applied to set aside the judgment on the grounds that the writ had not been personally served on him as prescribed by O. 10 r. 1(1) of the Rules of the High Court 1980 ('the RHC') and that the second solicitors had no authority to act on his behalf. The High Court set aside the summary judgment and the appellant appealed.

Held:
Per NH Chan JCA:

[1] Under O. 10 r. 1(1) of the RHC, a writ must be served personally on each defendant, subject to certain exceptions. Service by AR registered post was not allowed by the RHC at the material time.

[2] The respondent was never served personally. The entry of an appearance by the second solicitors did not cure this irregularity as they had not been authorised to act for the respondent. An unauthorised solicitor cannot waive the necessity of personal service on a defendant who is not his client.

[3] As the requirement for personal service of the writ had not been met, and none of the exceptions to O. 10 r. 1(1) applied, the subsequent proceedings were void and the respondent was entitled to set aside the summary judgment.

[Appeal dismissed.]

Case(s) referred to:
Chan Sio v. Dan Sin Wah [1955] MLJ 137 ***(foll)***
Kenneth Allison Ltd v. AE Limehouse & Co [1991] 3 WLR 671 ***(foll)***
Pelajaran Nasional Indonesia v. Joo Seang & Co Ltd [1958] MLJ 113 ***(foll)***
Pike v. Nairn & Co Ltd [1960] Ch 553 ***(aff)***
Oulton v. Radcliffe (1874) LR 9 CP 189 ***(aff)***

Legislation referred to:
Rules of the High Court 1980, O. 10 r. 1(1), (2), (3), O. 14 r. 1(1), O. 62 r. 1(1), (2), (3)

Other source(s) referred to:
Malaysian High Court Practice, 1998, vol 1, pp 15, 152, para 10.1.3

For the appellant - Jayanthi Pillay; M/s Kadir, Tan & Ramli
For the respondent - Leonard Anselm Gomes; M/s LA Gomes & Co

Reported by Anne Khoo

JUDGMENT

NH Chan JCA:

On 8 June 1990, Messrs Kadir, Tan & Ramli, the solicitors for the plaintiff, Supreme Finance (M) Bhd (appellant), sent a letter of demand (for $7,874,293.08) to the second and third defendants, namely, Lim Chin Hin and Wing Hong How (respondent) who were the guarantors of the first defendant company (Unijaya Sdn Bhd) which had borrowed $7,000,000 from the plaintiff.

On 2 August 1990, the plaintiff filed the present action in the Kuala Lumpur High Court against all the three defendants.

On 16 August 1990, the solicitors for the plaintiff (Messrs. Kadir, Tan & Ramli) wrote this letter to Messrs. N.K. Tan & Rahim who were, at that time, the lawyers for the respondent (third defendant). The letter reads:

WWH/2874/90/USB (LIT)
CO475/90/0003/SS

16th August, 1990

M/s. N.K. Tan & Rahim
Advocates & Solicitors
Suites 1505-1508, 15th Floor
Wisma HLA,
Jalan Raja Chulan
50200 Kuala Lumpur

BY HAND

Dear Sirs

KL High Court Suit No. D4-22-1179-90
Supreme Finance (M) Berhad vs
Unijaya Sdn Bhd & 2 others

We refer to the above matter and as requested in your letter of 11th July, 1990 we enclose herewith the following documents for your further attention:

1. Loan Facility Agreement; and

2. Guarantee Agreement.

We also enclose herewith a copy of the Writ of Summons dated 2nd August, 1990 by way of service on you as Solicitors for the 3rd Defendant.

Yours faithfully

Sgd.

encs

c.c. clients

The last paragraph of the letter is most strange. It seems to us that the solicitors for the plaintiff were oblivious of the Rules of the High Court 1980 (RHC) as to service of a writ. Order 10 r. 1(1) stipulates that (subject to the provisions of any written law and the RHC) a writ must be served personally on each defendant (the stipulation as to service by A.R. registered post was not inserted into the rules then). Yet, uncannily, by this letter the appellant through its solicitors was attempting to serve the writ on Messrs. N.K. Tan & Rahim when O. 10 r. 1(1) requires personal service on the respondent. They did not even have the courtesy of enquiring from the respondent's solicitors (Messrs. N.K. Tan & Rahim) whether they have instructions to accept service.

It was therefore not surprising that on 20 August 1990 Messrs N.K. Tan & Rahim replied to the appellant's solicitors' letter of 16 August 1990 telling them that they did not have instructions to accept service. The letter is reproduced below:

YOUR REF: CO475/90/0003/SS
OUR REF: WHH/2874/90/USB(LIT)

20th August 1990

M/s Kadir, Tan & Ramli
Advocates & Solicitors
43rd Floor Menara Maybank **BY HAND**
100 Jalan Tun Perak
50050 Kuala Lumpur

Dear Sirs

KL HIGH COURT SUIT NO: D4-22-1179-90
SUPREME FINANCE (M) BERHAD VS UNIJAYA SDN BHD & 2 OTHERS

We refer to your letter of 16th August 1990 concerning the above matter.

We have no instructions to accept service of Writ of Summons and accordingly we return herewith the sealed Summons. We believe our client is abroad and may be back on Monday, 27th August 1990.

Yours faithfully

Sgd.

CKL/sh

Encl

Order 10 r. 1 of the Rules of the High Court 1980 insofar as they are material to the present appeal reads:

> 1(1) Subject to the provisions of any written law and these rules, a writ must be served personally on each defendant [or by sending it by prepaid AR registered post addressed to his last known address]. (the words which we have put within square brackets were not yet in force at the time. The requirement as to service by AR registered post was only inserted in 1993 by PU(A) 192/ 93)
>
> (2) Where a defendant's solicitor indorses on the writ a statement that he accepts service of the writ on behalf of the defendant, the writ shall be deemed to have been duly served on that defendant and to have been so served on the date on which the indorsement was made.
>
> (3) Where a writ is not duly served on a defendant but he enters an unconditional appearance in the action begun by the writ, the writ shall be deemed to have been duly served on him and to have been so served on the date on which he entered appearance.

Rules of the High Court, O. 10 r. 1(1) stipulates that a writ must be served personally on each defendant. This is reiterated in O. 62 r. 1(1) which states that any document which is required by the Rules of the High Court to be served on a person need not be served personally unless it is required by an express provision of the rules or an order of the court to be so served. Here, O. 10 r. 1(1) (which deals with the service of a writ) expressly requires a writ to be served personally. For the sake of completeness, I reproduce O. 62 r. 1 below:

> 1(1) Any document which by virtue of these rules is required to be served on any person need not be served personally unless the document is one which by an express provision of these rules or by order of the court is required to be so served.
>
> (2) Paragraph (1) shall not affect the power of the court under any provision of these rules to dispense with the requirement for personal service.
>
> (3) No service of the writ shall be required where the defendant or his solicitor undertakes in writing to accept service and enter an appearance.

From the above provisions of the rules (O. 10 r. 1 and O. 62 r. 1), we have summarised below their effect:

(1) Where service of a writ is required by the rules or by an order of the court to be served personally, it must be so served on each defendant or (since 1993) by sending it by prepaid AR registered post addressed to the defendant's last known address (O. 10 r. 1(1) and O. 62 r. 1(1)). See also *Kenneth Allison Ltd v. A.E. Limehouse & Co.* [1991] 3 WLR 671, HL. In the present case the respondent Wing Hong How was never personally served with the writ at all.

(2) But a writ is not required to be served personally on a defendant in the following situations:

   (i) Where a defendant's solicitor indorses on the writ a statement that he accepts service of the writ on behalf of the defendant. In such a case the writ is deemed to have been served on the defendant on the date on which the indorsement was made. (O. 10 r. 1(2));

   (ii) Where, without a writ being duly served on him, a defendant enters unconditional appearance in the action. In such a case the writ is deemed to have been served on him on the date on which he entered appearance. (O. 10 r. 1(3));

   (iii) Where the defendant or his solicitor undertakes in writing to accept service and enter an appearance. (O. 62 r. 1(3)).

See also *Malaysian High Court Practice* (1998), vol. 1, at p. 15 para. (10.1.3) which reads:

> A writ (including an originating summons, a notice of an originating motion and a petition, see r. 5 below) must be served personally where the rules or an order of the court so require it: O. 62 r. 1(1); ...
>
> However, personal service is sometimes exempted, and this includes:
>
> (i) where the defendant's solicitor indorses on the writ or other originating document that he accepts service on behalf of the defendant: O. 10 r. 1(2) and O. 62 r. 1(3);
>
> (ii) where the defendant enters an unconditional appearance although the writ is not duly served on him: O. 10 r. 1(3);
>
> (iii) ... (not applicable to the present case);
>
> (iv) ... (not applicable to the present case);
>
> (v) ... (not applicable to the present case);
>
> (vi) ... (not applicable to the present case);
>
> (vii) ... (not applicable to the present case);
>
> (viii) where the court dispenses with the requirement for personal service: O. 62 r. 1(2).

In the present case the respondent was never served personally with the writ. Personal service was also not exempted in the present case. Personal service would have been exempted had the respondent's solicitors indorsed on the writ that they accepted service on behalf of the respondent (O. 10 r. 1(2)) or had the respondent or his solicitors undertaken in writing to accept service and entered an appearance (O. 62 r. 1(3)) or had the respondent entered unconditional appearance although the writ was not duly served on him (O. 10 r. 1(3)). None of these exemptions from the necessity to serve the writ personally on the respondent apply in the present case.

Strangely and out of the blue, a firm of solicitors by the name of Messrs S.K. Tan & Co. suddenly materialised (some three years after Messrs N.K. Tan & Rahim had told the appellant's solicitors that they did not have instructions to accept service) and entered an appearance for Unijaya Sdn Bhd (1st defendant), Lim Chin Hin (2nd defendant) and Wong Hong How (3rd defendant, the respondent) which was filed on 30 September 1993. But the respondent did not instruct these solicitors to act for him, let alone to enter an appearance on his behalf (see respondent's affidavit at p. 38 of the record).

The writ must be served personally as this is required by an express provision of the rules (O. 10 r. 1(1) and O. 62 r. 1(1)). In *Kenneth Allison Ltd v. A.E. Limehouse & Co. (supra)*, the English House of Lords explains how personal service is effected under the rules. The headnote reads, at 672:

> Held, (1) that personal service required the handing of the document to the person to be served or telling him what it contained and leaving it with or near him; and that, therefore, the plaintiffs' writ had not been served personally on the defendants' partner in accordance with the provisions of R.S.C., Ord. 10 r. 1(1), Ord. 65 r. 2 and Ord. 81 r. 3(1)(a) (post, pp. 674F-G, 680H, 684G-H, 688C, D).
>
> But (2), ... nothing in Order 10 ... prohibited agreement by the parties on a mode of service of process outside its provisions; and that, accordingly, the service of the plaintiffs' writ on the partner's personal assistant with the partners's express authorisation had constituted valid service (post, pp. 679F-680D, H, 688C, D).

That is why it is quite usual for lawyers who want to serve a writ on a defendant who is represented to enquire from the defendant's lawyers whether they have instructions to accept service. And if they agree (on the authorisation of their client) to accept service then such service on the defendant's lawyers would have constituted valid service (*Kenneth Allison Ltd v. A.E. Limehouse & Co.* [1991] 3 WLR 671, HL).

So that, in this country as in England, personal service on the defendant is essential: O. 10 r. 1(1). However, this rule is subject to certain exceptions. Personal service on the defendant is exempted where the defendant's solicitor indorses on the writ that he accepts service on behalf of the defendant (O. 10 r. 1(2)) or he undertakes in writing to accept service and enter an appearance (O. 62 r. 1(3)), or where the defendant himself enters an unconditional appearance although the writ is not duly served on him (O. 10 r. 1(3)). Since S.K. Tan & Co. did not indorse on the writ or give a written undertaking that they would accept service on behalf of the respondent (which, in any case, they could not have done because they have not been authorised by the respondent to do so), personal service on the respondent was not exempted. Therefore, personal service was required. Yet, S.K. Tan & Co. somehow managed to enter appearance for the respondent who was never served with the writ at all. These lawyers have done what they did by completely ignoring the provisions of the Rules of the High Court, particularly, O. 10 r. 1 and O. 62 r. 1.

"Where the law prescribes the manner in which service is to be effected in a certain situation, failure to comply with the requirements may entitle the defendant to set aside a judgment obtained by default: *Pelajaran Nasional*

Indonesia v. Joo Seang & Co. Ltd [1958] MLJ 113; *Chan Sio v. Dan Sin Wah* [1955] MLJ 137;" (see *Malaysian High Court Practice* (1998), vol. 1, p. 152, para. (10.1.3)).

Here, the instant case concerns an application by the respondent to set aside an O. 14 judgment obtained by the appellant behind his back. The High Court had acted in the interests of the respondent and set aside the summary judgment. We are of the view that the judge below was right in doing so and dismissed the appeal.

O. 14 r. 1(1) states:

> 1(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and **that defendant has entered an appearance** in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the court for judgment against that defendant. (emphasis supplied)

Since personal service of the writ is required and the writ was not duly served on the respondent in the present case, what then is the effect of S.K. Tan & Co. entering an appearance for the respondent? By not effecting personal service of the writ means that the writ was never served on the respondent at all. Unless service is exempted by the rules (which is not the case here) or dispensed with by an order of the court under O. 62 r. 1(2) (which is also not the case here), service of the writ is required. The non-service of the writ could not be cured by the unconditional appearance entered by S.K. Tan & Co. on behalf of the respondent as they have not been duly authorised to act for him. S.K. Tan & Co.'s unauthorised appearance, when the writ was not served and service was not exempted, could not waive the necessity of service of the writ on the respondent. The fact of not serving the writ when it was required by the rules to be duly served (without it being waived by the respondent entering an unconditional appearance to it (O. 10 r. 1(3)) made the subsequent proceedings void. The appearance was rendered void because S.K. Tan & Co. were not duly authorised to act for the respondent and all subsequent proceedings, including the judgment under O. 14 (which was obtained under the void appearance), could be set aside. However, a defendant himself or through his duly authorised solicitor could waive service and enter an unconditional appearance without the writ being duly served on him (but that is not the case here): see O. 10 r. 1(3) and, also *Oulton v. Radcliffe* [1874] LR 9 CP 189; *Pike v. Nairn & Co. Ltd* [1960] Ch. 553.

In *Pike v. Nairn* it was held (554) that defendants or respondents to an originating summons, which was analogous to a writ, could waive service of the summons on themselves and enter an appearance to it. Cross J said, at 560:

> The service of the process of the court is made necessary in the interests of the defendant so that orders may not be made behind his back. A defendant, therefore, has always been able to waive the necessity of service and to enter an appearance to the writ as soon as he hears that it has been issued against him, although it has not been served on him: see *Fell v. Christ's College, Cambridge* [1787] 2 Bro. C.C. 278; *Oulton v. Radcliffe* [1874] LR 9 CP 189.

Similarly, under our O. 10 r. 1(3) a defendant who enters an unconditional appearance without the writ being duly served on him is deemed to have been duly served with the writ.

In *Oulton v. Radcliffe*, the headnote reads (189):

> A writ was issued out of the Court of Common Pleas at Lancaster, which is a superior Court, for a cause of action cognisable by that court, but which arose beyond its jurisdiction. The service was upon the defendant's attorney beyond the jurisdiction; and he gave an undertaking to appear and did appear for the defendant:
>
> Held, that the irregularity in the service was cured by the appearance.

Keating J said, at 193:

> The facts are these:- The writ was issued out of the palatinate court in respect of a cause of action not arising within the jurisdiction of that court, and sent to the defendant's attorney, who also resided out of the jurisdiction. The latter being duly authorized to act for the defendant, accepted the service, and entered an appearance thereto. And the question is, whether the fact of the writ having been served out of the jurisdiction makes the subsequent proceedings void; in other words, whether the appearance of the defendant by his attorney, though the service was such that he was not bound to appear, gives the palatinate court jurisdiction. I am of opinion that the appearance did waive the objection to the jurisdiction.

He concluded thus, at 194:

> This question came to be considered in the Court of Exchequer in *Forbes v. Smith* 10 Ex. 717, under s. 18 of the Common Law Procedure Act, 1852. A British subject residing abroad was served with a writ indorsed with a claim in respect of promissory notes made abroad: the defendant appeared; and it was held that the appearance waived the irregularity in the service. Martin, B., in his judgment, anticipates the very distinction which has been suggested here. "I think," he says, "that, even if a foreigner came before the Court and stated that, being in ignorance what course to pursue, he appeared, the Court would, except in very peculiar circumstances, deal with him as with any other person, and refuse his application to set aside the appearance." Here the writ was duly issued: and what in effect happens is this: the defendant (through his attorney) having heard that a writ has issued, says to the plaintiff's attorney, "You need not take the trouble to serve me: I will appear:" and he does enter an appearance. I think the rule should be discharged.

A defendant himself (or through a solicitor who has been duly authorised by the defendant to act for him) could waive the necessity of personal service and enter an unconditional appearance to the writ although it has not been served on him (O. 10 r. 1(3)). But an entry of appearance by lawyers who have not been duly authorised to act for the defendant could not cure the irregularity in the service of the writ. An unauthorised solicitor could not waive the necessity of personal service on a defendant who is not his client.

Therefore, unless the respondent has entered an appearance (see O. 14 r. 1(1)), the appellant would not be able to apply for summary judgment under O. 14. The respondent who had never entered an appearance to the writ did not waive the necessity of personal service on him and, therefore, he was entitled to set aside the judgment obtained behind his back by the appellant under O. 14. In the result, we dismissed the appeal.